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ALAMEDA COUNTY

MAY 30 2019

CLERK OF THE SUPERIOR COURT

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 17 Divine Health, Inc., individually and
 18 doing business as Divine Health Nutritional Products

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 20 **COUNTY OF ALAMEDA**

21 **ENVIRONMENTAL RESEARCH**
 22 **CENTER, INC., a California non-profit**
 23 **corporation**

24 **Plaintiff,**

25 **vs.**

26 **DIVINE HEALTH, INC., individually and**
 27 **doing business as DIVINE HEALTH**
 28 **NUTRITIONAL PRODUCTS; and DOES**
1-100

Defendants.

CASE NO. RG18930221

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: November 28, 2018
 Trial Date: None set

1. INTRODUCTION

1.1 On November 28, 2018, Plaintiff Environmental Research Center, Inc. ("ERC"),
 a non-profit corporation, as a private enforcer and in the public interest, initiated this action by

1 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint")
2 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
3 ("Proposition 65"), against Divine Health, Inc., individually and doing business as Divine
4 Health Nutritional Products ("Divine Health"), and Does 1-100. In this action, ERC alleges
5 that a number of products manufactured, distributed, or sold by Divine Health contain lead
6 and/or cadmium, chemicals listed under Proposition 65 as carcinogens and reproductive toxins,
7 and expose consumers to these chemicals at a level requiring a Proposition 65 warning. These
8 products (referred to hereinafter individually as a "Covered Product" or collectively as
9 "Covered Products") are: (1) Divine Health Don Colbert M.D. Fermented Protein SupremeFood
10 Plant Based Protein Vanilla Flavor (lead, cadmium), (2) Divine Health Don Colbert M.D.
11 Fermented Sports SupremeFood Lemon-Lime (lead), (3) Divine Health Nutritional Products
12 Fermented Green SupremeFood (lead), (4) Divine Health Don Colbert M.D. Slender Formula 1
13 (lead), (5) Divine Health Don Colbert M.D. Fermented Green SupremeFood Apple Cinnamon
14 (lead), (6) Divine Health Don Colbert M.D. Enhanced Multivitamin (lead), (7) Divine Health
15 Don Colbert M.D. Extra Strength Bone Health (lead), (8) Divine Health Don Colbert M.D. Dr.
16 Colbert's Keto Zone Dr Colbert M.D. Instant Ketones Coconut Cream Flavor (lead), and (9)
17 Divine Health Don Colbert M.D. High Potency Turmeric with BioPerine (lead).

18 1.2 ERC and Divine Health are hereinafter referred to individually as a "Party" or
19 collectively as the "Parties."

20 1.3 ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
21 causes, helping safeguard the public from health hazards by reducing the use and misuse of
22 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
23 and encouraging corporate responsibility.

24 1.4 For purposes of this Consent Judgment, the Parties agree that Divine Health is a
25 business entity that has employed ten or more persons at all times relevant to this action, and
26 qualifies as a "person in the course of doing business" within the meaning of Proposition 65.
27 Divine Health manufactures, distributes, and/or sells the Covered Products.

28 1.5 The Complaint is based on allegations contained in ERC's Notices of Violation

1 dated June 12, 2018 and August 31, 2018 that were served on the California Attorney General,
2 other public enforcers, and Divine Health ("Notices"). True and correct copies of the 60-Day
3 Notices dated June 12, 2018 and August 31, 2018 are attached hereto as **Exhibits A and B** and
4 each is incorporated herein by reference. More than 60 days have passed since the Notices
5 were served on the Attorney General, public enforcers, and Divine Health and no designated
6 governmental entity has filed a complaint against Divine Health with regard to the Covered
7 Products or the alleged violations.

8 **1.6** ERC's Notices and Complaint allege that use of the Covered Products exposes
9 persons in California to lead and/or cadmium without first providing clear and reasonable
10 warnings in violation of California Health and Safety Code section 25249.6. Divine Health
11 denies all material allegations contained in the Notices and Complaint. Nothing in the Consent
12 Judgment shall be construed as an admission by Divine Health of any fact, issue of law or
13 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as
14 an admission by Divine Health of any fact, issue of law or violation of law, at any time, for any
15 purpose.

16 **1.7** The Parties have entered into this Consent Judgment in order to settle,
17 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.
18 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute or
19 be construed as an admission by any of the Parties or by any of their respective officers,
20 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates
21 under common ownership (full or partial), franchisees, licensees, customers, suppliers,
22 distributors, wholesalers, or retailers of any fact, issue of law, or violation of law.

23 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
24 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have,
25 individually or jointly, in any current or future legal proceeding unrelated to these proceedings.

26 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as
27 a Judgment by this Court.

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1 **2. JURISDICTION AND VENUE**

2 For purposes of this Consent Judgment and any further court action that may become
3 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
4 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
5 over Divine Health as to the acts alleged in the Complaint, that venue is proper in Alameda
6 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
7 resolution of all claims up through and including the Effective Date which were or could have
8 been asserted in this action based on the facts alleged in the Notices and Complaint.

9 **3. INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS**

10 **3.1** Beginning six (6) months after the Effective Date, Divine Health shall be
11 permanently enjoined from manufacturing for sale in the State of California, "Distributing into
12 the State of California," or directly selling in the State of California, any Covered Products
13 which expose a person to a "Daily Lead Exposure Level" of more than 0.5 micrograms of lead
14 per day and/or "Daily Cadmium Exposure Level" of more than 4.1 micrograms of cadmium per
15 day unless it meets the warning requirements under Section 3.2.

16 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State
17 of California" shall mean to directly ship a Covered Product into California for sale in
18 California or to sell a Covered Product to a distributor that Divine Health knows or has reason
19 to know will sell the Covered Product in California.

20 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure
21 Level" shall be measured in micrograms, and shall be calculated using the following formula:
22 micrograms of lead per gram of product, multiplied by grams of product per serving of the
23 product (using the largest serving size appearing on the product label), multiplied by servings
24 of the product per day (using the largest number of recommended daily servings appearing on
25 the label), which equals micrograms of lead exposure per day. If the label contains no
26 recommended daily servings, then the number of recommended daily servings shall be one.

27 **3.1.3** For purposes of this Consent Judgment, the "Daily Cadmium Exposure
28 Level" shall be measured in micrograms, and shall be calculated using the following formula:

1 micrograms of cadmium per gram of product, multiplied by grams of product per serving of the
2 product (using the largest serving size appearing on the product label), multiplied by servings
3 of the product per day (using the largest number of recommended daily servings appearing on
4 the label), which equals micrograms of cadmium exposure per day. If the label contains no
5 recommended daily servings, then the number of recommended daily servings shall be one.

6 **3.2 Clear and Reasonable Warnings**

7 If Divine Health is required to provide a warning pursuant to Section 3.1, the following
8 warning must be utilized ("Warning"):

9 **WARNING:** Consuming this product can expose you to chemicals including [lead] [and]
10 [cadmium] which is known to the State of California to cause [cancer and] birth defects or
11 other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

12 Divine Health shall use the phrase "cancer and" in the Warning if Divine Health has
13 reason to believe that the the "Daily Lead Exposure Level" is greater than 15 micrograms of lead
14 as determined pursuant to the quality control methodology set forth in Section 3.4 or if Divine
15 Health has reason to believe that another Proposition 65 chemical is present which may require a
16 cancer warning. As identified in the brackets, the warning shall identify at least one chemical
17 present per endpoint (cancer or birth defects or other reproductive harm) in each of the Covered
18 Products.

19 The Warning shall appear on the label of each Covered Product or on Divine Health's
20 checkout page on its website for California consumers identifying any Covered Product, or a link
21 to the Warning, using the word "WARNING," shall appear on the product display page prior to
22 completing checkout on Divine Health's website when a California delivery address is indicated
23 for any purchase of any Covered Product. An asterisk or other identifying method, such as text
24 accompanying the product, must be utilized to identify which product(s) on the checkout page
25 are subject to the Warning. The Warning may be used in conjunction with a more general
26 warning in the checkout procedures indicating that item(s) in the customer's order are subject to
27 a California Proposition 65 warning. If the Warning appears on the label of a Covered Product,
28

1 the Warning shall be securely affixed to or printed upon the label of the Covered Product and it
2 must be set off from other surrounding information and enclosed in a box.

3 The Warning shall be at least the same size as the largest of any other health or safety
4 warnings also appearing on its website or on the label or container of the Covered Product's
5 packaging and the word "WARNING" shall be in all capital letters and in bold print. No
6 statements intended to or likely to have the effect of diminishing the impact of the Warning on the
7 average lay person shall accompany the Warning. Further no statements may accompany the
8 Warning that state or imply that the source of the listed chemical has an impact on or results in a
9 less harmful effect of the listed chemical.

10 Divine Health must display the above Warning with such conspicuousness, as compared
11 with other words, statements or designs on the label or container, or on its website, if applicable, to
12 render the Warning likely to be read and understood by an ordinary individual under customary
13 conditions of purchase or use of the product. If subsequently enacted changes to Proposition 65 or
14 its implementing regulations require the use of additional or different information on any warning,
15 the Parties agree that the new safe harbor warning may be utilized in place of the warnings set
16 forth in this Section.

17 3.3 Reformulated Covered Products

18 A Reformulated Covered Product is a Covered Product for which the "Daily Lead
19 Exposure Level" is no greater than 0.5 micrograms of lead per day and/or "Daily Cadmium
20 Exposure Level" is no more than 4.1 micrograms of cadmium per day as determined by the quality
21 control methodology described in Section 3.4.

22 3.4 Testing and Quality Control Methodology

23 3.4.1 Beginning within one year of the Effective Date, Divine Health shall
24 arrange for lead and/or cadmium testing of the Covered Products at least once a year for a
25 minimum of three (3) consecutive years by arranging for testing of five randomly selected
26 samples of each of the Covered Products, in the form intended for sale to the end-user, which
27 Divine Health intends to sell or is manufacturing for sale in California, directly selling to a
28 consumer in California or "Distributing into the State of California." If tests conducted

1 pursuant to this Section demonstrate that no Warning is required for a Covered Product during
2 each of three (3) consecutive years, then the testing requirements of this Section will no longer
3 be required as to that Covered Product. However, if during or after the three-year testing
4 period, Divine Health changes ingredient suppliers for any of the Covered Products and/or
5 reformulates any of the Covered Products, Divine Health shall test that Covered Product
6 annually for at least three (3) consecutive years after such change is made.

7 3.4.2 For purposes of measuring the "Daily Lead Exposure Level" and/or
8 "Daily Cadmium Exposure Level," the highest lead and/or cadmium detection result of the five
9 (5) randomly selected samples of the Covered Products will be controlling.

10 3.4.3 All testing pursuant to this Consent Judgment shall be performed using a
11 laboratory method that complies with the performance and quality control factors appropriate
12 for the method used, including limit of detection, qualification, accuracy, and precision that
13 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")
14 achieving a limit of quantification of less than or equal to 0.010 mg/kg.

15 3.4.4 All testing pursuant to this Consent Judgment shall be performed by an
16 independent third party laboratory certified by the California Environmental Laboratory
17 Accreditation Program or an independent third-party laboratory that is registered with the
18 United States Food & Drug Administration.

19 3.4.5 Nothing in this Consent Judgment shall limit Divine Health's ability to
20 conduct, or require that others conduct, additional testing of the Covered Products, including
21 the raw materials used in their manufacture.

22 3.4.6 Within thirty (30) days of ERC's written request, Divine Health shall
23 deliver lab reports obtained pursuant to Section 3.4 to ERC. Divine Health shall retain all test
24 results and documentation for a period of three years from the date of each test.

25 4. SETTLEMENT PAYMENT

26 4.1 In full satisfaction of all potential civil penalties, additional settlement payments,
27 attorney's fees, and costs, Divine Health shall make, or have made on its behalf, a total
28 payment of \$50,000.00 ("Total Settlement Amount") to ERC, with an initial payment of

1 \$20,000.00 ("Initial Payment") to be paid within five (5) business days of the Effective Date
2 with the payment of \$15,000.00 ("Second Payment") to be paid within thirty-five (35) days
3 after the Effective Date ("Due Date") and with the payment of \$15,000.00 ("Third Payment")
4 to be paid within sixty five (65) days after the Effective Date ("Due Date"). Divine Health
5 shall make, or have made on its behalf, these payments by wire transfer to ERC's account, for
6 which ERC will give Divine Health the necessary account information. The Total Settlement
7 Amount shall be apportioned as follows: \$9,477.10 shall be considered a civil penalty pursuant
8 to California Health and Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$7,107.82)
9 of the civil penalty to the Office of Environmental Health Hazard Assessment ("OEHHHA") for
10 deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California
11 Health and Safety Code section 25249.12(c). ERC will retain the remaining 25% (\$2,369.28)
12 of the civil penalty.

13 4.2 \$3,600.26 shall be distributed to ERC as reimbursement to ERC for reasonable
14 costs incurred in bringing this action.

15 4.3 \$7,107.82 shall be distributed to ERC as an Additional Settlement Payment
16 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d) and
17 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly
18 caused by Defendant in this matter. These activities are detailed below and support ERC's
19 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary
20 supplement products in California. ERC's activities have had, and will continue to have, a direct
21 and primary effect within the State of California because California consumers will be benefitted
22 by the reduction and/or elimination of exposure to lead and/or cadmium in dietary supplements
23 and/or by providing clear and reasonable warnings to California consumers prior to ingestion of
24 the products.

25 Based on a review of past years' actual budgets, ERC is providing the following list of
26 activities ERC engages in to protect California consumers through Proposition 65 citizen
27 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those
28 activities: (1) ENFORCEMENT (65-80%): obtaining, shipping, analyzing, and testing dietary

1 supplement products that may contain lead and/or cadmium and are sold to California
2 consumers. This work includes continued monitoring and enforcement of past consent judgments
3 and settlements to ensure companies are in compliance with their obligations thereunder, with a
4 specific focus on those judgments and settlements concerning lead and/or cadmium. This work
5 also includes investigation of new companies that ERC does not obtain any recovery through
6 settlement or judgment; (2) VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining
7 ERC's Voluntary Compliance Program by acquiring products from companies, developing and
8 maintaining a case file, testing products from these companies, providing the test results and
9 supporting documentation to the companies, and offering guidance in warning or implementing a
10 self-testing program for lead and/or cadmium in dietary supplement products; and (3) "GOT
11 LEAD" PROGRAM (up to 5%): maintaining ERC's "Got Lead?" Program which reduces the
12 numbers of contaminated products that reach California consumers by providing access to free
13 testing for lead in dietary supplement products (Products submitted to the program are screened
14 for ingredients which are suspected to be contaminated, and then may be purchased by ERC,
15 catalogued, sent to a qualified laboratory for testing, and the results shared with the consumer
16 that submitted the product).

17 ERC shall be fully accountable in that it will maintain adequate records to document and
18 will be able to demonstrate how the ASP funds will be spent and can assure that the funds are
19 being spent only for the proper, designated purposes described in this Consent Judgment. ERC
20 shall provide the Attorney General, within thirty days of any request, copies of documentation
21 demonstrating how such funds have been spent.

22 4.4 \$1,620.00 shall be distributed to Michael Freund as reimbursement of ERC's
23 attorney's fees, \$6,922.50 shall be distributed to Ryan Hoffman as reimbursement of ERC's
24 attorney's fees, while \$21,272.32 shall be distributed to ERC for its in-house legal fees. Except
25 as explicitly provided herein, each Party shall bear its own fees and costs.

26 4.6 In the event that Divine Health fails to remit the Initial Payment when due, or
27 the Second Payment and/or Third Payment owed under Section 4 of this Consent Judgment on
28 or before the applicable Due Dates, Divine Health shall be deemed to be in material breach of

1 its obligations under this Consent Judgment. ERC shall provide written notice of the
2 delinquency to Divine Health via electronic mail. If Divine Health fails to deliver the late
3 payment(s) (the Initial Payment and/or the Second Payment and/or the Third Payment(s))
4 within ten (10) business days from the written notice, the Total Settlement Amount, less any
5 amounts previously paid pursuant to Section 4.1, shall be immediately due and owing and shall
6 accrue interest at the statutory judgment interest rate provided in the California Code of Civil
7 Procedure section 685.010. Additionally, Divine Health agrees to pay ERC's reasonable
8 attorney's fees and costs for any efforts to collect any payment(s) due under this Consent
9 Judgment.

10 **5. MODIFICATION OF CONSENT JUDGMENT**

11 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by
12 written stipulation of the Parties and upon entry by the Court of a modified consent judgment or
13 (ii) by motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a
14 modified consent judgment.

15 **5.2** If Divine Health seeks to modify this Consent Judgment under Section 5.1, then
16 Divine Health must provide written notice to ERC of its intent ("Notice of Intent"). If ERC
17 seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC
18 must provide written notice to Divine Health within thirty (30) days of receiving the Notice of
19 Intent. If ERC notifies Divine Health in a timely manner of ERC's intent to meet and confer,
20 then the Parties shall meet and confer in good faith as required in this Section. The Parties
21 shall meet in person or via telephone within thirty (30) days of ERC's notification of its intent
22 to meet and confer. Within thirty (30) days of such meeting, if ERC disputes the proposed
23 modification, ERC shall provide to Divine Health a written basis for its position. The Parties
24 shall continue to meet and confer for an additional thirty (30) days in an effort to resolve any
25 remaining disputes. Should it become necessary, the Parties may agree in writing to different
26 deadlines for the meet-and-confer period.

27 **5.3** In the event that Divine Health initiates or otherwise requests a modification
28 under Section 5.1, and the meet and confer process leads to a joint motion or application for a

1 modification of the Consent Judgment, Divine Health shall reimburse ERC its costs and
2 reasonable attorney's fees for the time spent in the meet-and-confer process and filing and
3 arguing the motion or application. ERC shall not be reimbursed for costs or attorney's fees for
4 an uncontested motion, or for a ministerial motion (such as a change in name or contact
5 information) or if ERC does not expend more than two (2) hours of attorney time on the joint
6 motion. Where the meet-and-confer process does not lead to a joint motion or application in
7 support of a modification of the Consent Judgment, then either Party may seek judicial relief on
8 its own.

9 **5.4** In the event that Proposition 65 is repealed or preempted as to food products,
10 then Divine Health shall have no further obligation pursuant to this Consent Judgment with
11 respect to, and to the extent that the Covered Products are so affected.

12 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
13 **JUDGMENT**

14 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
15 this Consent Judgment.

16 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated
17 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
18 inform Divine Health in a reasonably prompt manner of its test results, including information
19 sufficient to permit Divine Health to identify the Covered Products at issue. Divine Health
20 shall, within thirty (30) days following such notice, provide ERC with testing information, from
21 an independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,
22 demonstrating Divine Health's compliance with the Consent Judgment, if warranted. The
23 Parties shall first attempt to resolve the matter prior to ERC taking any further legal action.

24 **7. APPLICATION OF CONSENT JUDGMENT**

25 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their
26 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
27 affiliates under common ownership (full or partial), divisions, franchisees, licensees, customers
28 (excluding private labelers), distributors, wholesalers, retailers, predecessors, successors, and

1 assigns. This Consent Judgment shall have no application to any Covered Product which is
2 distributed or sold exclusively outside the State of California and which is not used by California
3 consumers.

4 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

5 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,
6 on behalf of itself and in the public interest, and Divine Health and its respective officers,
7 directors, shareholders, owners, employees, agents, parent companies, subsidiaries, divisions,
8 affiliated entities under common (full or partial) ownership, attorneys, suppliers, franchisees,
9 licensees, customers (not including private label customers of Divine Health), distributors,
10 wholesalers, retailers, and all other upstream and downstream entities in the distribution chain
11 of any Covered Product, and the predecessors, successors, and assigns of any of them
12 (collectively, "Released Parties"). ERC, on behalf of itself and in the public interest, hereby
13 fully releases and discharges the Released Parties from any and all claims, actions, causes of
14 action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that
15 could have been asserted from the handling, use, or consumption of the Covered Products, as to
16 any alleged violation of Proposition 65 or its implementing regulations arising from the failure
17 to provide Proposition 65 warnings on the Covered Products regarding lead and/or cadmium up
18 to and including the Effective Date.

19 **8.2** ERC on its own behalf only, and Divine Health on its own behalf only,
20 further waive and release any and all claims they may have against each other and their
21 respective officers, directors, shareholders, owners, employees, agents, parents, subsidiaries,
22 divisions, affiliated entities under common (full or partial) ownership, and attorneys for all
23 actions or statements made or undertaken in the course of seeking or opposing enforcement of
24 Proposition 65 in connection with the Notices and Complaint up through and including the
25 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party's
26 right to seek to enforce the terms of this Consent Judgment.

27 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
28 alleged in the Notices and Complaint, and relating to the Covered Products, will develop or be

1 discovered. ERC on behalf of itself only, and Divine Health on behalf of itself only,
2 acknowledge that this Consent Judgment is expressly intended to cover and include all such
3 claims up through and including the Effective Date, including all rights of action therefore.
4 ERC and Divine Health acknowledge that the claims released in Sections 8.1 and 8.2 above
5 may include unknown claims, and nevertheless waive California Civil Code section 1542 as to
6 any such unknown claims. California Civil Code section 1542 reads as follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
9 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
10 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.

11 ERC on behalf of itself only, and Divine Health on behalf of itself only, acknowledge and
12 understand the significance and consequences of this specific waiver of California Civil Code
13 section 1542.

14 8.4 Compliance with the terms of this Consent Judgment shall be deemed to
15 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
16 and/or cadmium in the Covered Products as set forth in the Notices and Complaint.

17 8.5 Nothing in this Consent Judgment is intended to apply to any occupational or
18 environmental exposures arising under Proposition 65, nor shall it apply to any of Divine
19 Health's products other than the Covered Products.

20 9. SEVERABILITY OF UNENFORCEABLE PROVISIONS

21 In the event that any of the provisions of this Consent Judgment are held by a court to be
22 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

23 10. GOVERNING LAW

24 The terms and conditions of this Consent Judgment shall be governed by and construed in
25 accordance with the laws of the State of California.

26 11. PROVISION OF NOTICE

27 All notices required to be given to either Party to this Consent Judgment by the other shall
28 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via

1 email may also be sent.

2 **FOR ENVIRONMENTAL RESEARCH CENTER, INC.:**

3 Chris Heptinstall, Executive Director, Environmental Research Center
4 3111 Camino Del Rio North, Suite 400
5 San Diego, CA 92108
6 Telephone: (619) 500-3090
7 Email: chris_erc501c3@yahoo.com

8 With a copy to:

9 Michael Freund

10 Ryan Hoffman

11 Michael Freund & Associates

12 1919 Addison Street, Suite 105

13 Berkeley, CA 94704

14 Telephone: (510) 540-1992

15 Facsimile: (510) 540-5543

16 **DIVINE HEALTH, INC., individually and doing business as DIVINE HEALTH**
17 **NUTRITIONAL PRODUCTS**

18 Kyle Colbert

19 Divine Health, Inc.

20 1908 Boothe Circle

21 Longwood, FL 32750

22 Telephone: (407) 732-6952

23 With a copy to:

24 Abhishek K. Gurnani

25 Amin Talati Upadhye LLP

26 100 S. Wacker Drive, Suite 2000

27 Chicago, IL 60606

28 Telephone: (312) 327-3325

12. **COURT APPROVAL**

12.1 Upon execution of this Consent Judgment by the Parties, ERC shall notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of this Consent Judgment.

12.2 If the California Attorney General objects to any term in this Consent Judgment, the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to the hearing on the motion.

1 12.3 If this Stipulated Consent Judgment is not approved by the Court, it shall be
2 void and have no force or effect.

3 **13. EXECUTION AND COUNTERPARTS**

4 This Consent Judgment may be executed in counterparts, which taken together shall be
5 deemed to constitute one document. A facsimile or .pdf signature shall be construed to be as valid
6 as the original signature.

7 **14. DRAFTING**

8 The terms of this Consent Judgment have been reviewed by the respective counsel for each
9 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
10 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and
11 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,
12 and no provision of this Consent Judgment shall be construed against any Party, based on the fact
13 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any
14 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated
15 equally in the preparation and drafting of this Consent Judgment.

16 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

17 If a dispute arises with respect to either Party's compliance with the terms of this Consent
18 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in
19 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be
20 filed in the absence of such a good faith attempt to resolve the dispute beforehand.

21 **16. ENFORCEMENT**

22 ERC may, by motion or order to show cause before the Superior Court of Alameda
23 County, enforce the terms and conditions contained in this Consent Judgment. In any action
24 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,
25 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.
26 To the extent the failure to comply with the Consent Judgment constitutes a violation of
27 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,
28 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by

1 law for failure to comply with Proposition 65 or other laws.

2 **17. ENTIRE AGREEMENT, AUTHORIZATION**

3 17.1 This Consent Judgment contains the sole and entire agreement and
4 understanding of the Parties with respect to the entire subject matter herein, and any and all
5 prior discussions, negotiations, commitments, and understandings related hereto. No
6 representations, oral or otherwise, express or implied, other than those contained herein have
7 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
8 herein, shall be deemed to exist or to bind any Party.

9 17.2 Each signatory to this Consent Judgment certifies that he or she is fully
10 authorized by the Party he or she represents to stipulate to this Consent Judgment.

11 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
12 **CONSENT JUDGMENT**

13 This Consent Judgment has come before the Court upon the request of the Parties. The
14 Parties request the Court to fully review this Consent Judgment and, being fully informed
15 regarding the matters which are the subject of this action, to:

16 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
17 equitable settlement of all matters raised by the allegations of the Complaint that the matter has
18 been diligently prosecuted, and that the public interest is served by such settlement; and

19 (2) Make the findings pursuant to California Health and Safety Code section
20 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

21 **IT IS SO STIPULATED:**


22 Dated: 11/28/, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

23 By: 
24 Chris Heppner, Executive Director
25
26
27
28

1 Dated: 11/26/18, 2018


DIVINE HEALTH, INC., individually and
doing business as DIVINE HEALTH
NUTRITIONAL PRODUCTS

By: 
Its: CEO

7 APPROVED AS TO FORM:


8 Dated: 12/3, 2018

MICHAEL FREUND & ASSOCIATES

By: 
Michael Freund
Ryan Hoffman
Attorneys for Plaintiff Environmental
Research Center, Inc.

14 Dated: November 30, 2018

CALL & JENSEN


By: 
Joshua G. Simon
Attorney for Defendant Divine Health,
Inc., individually and doing business as
Divine Health Nutritional Products

21 ORDER AND JUDGMENT

22 Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is
23 approved and Judgment is hereby entered according to its terms.

24 IT IS SO ORDERED, ADJUDGED AND DECREED.

26 Dated: MAY 30, 2018⁹


Judge of the Superior Court
Stephen Pulido